



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 11, 2022

David E. Kendig
Director
Woodruff, Spradlin & Smart
555 Anton Boulevard, Suite 1200
Costa Mesa, CA 92626

Re: Your Request for Advice
Our File No. A-22-051

Dear Mr. Kendig:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. May City of Tustin Mayor Austin Lumbard and Councilman Ryan Gallagher take part in decisions relating to the amendment of a specific plan that would impact the development of a specific plan area where the officials each own residences located less than 500 feet from the plan area?
2. If Mayor Lumbard and Councilmember Gallagher are generally prohibited from taking part in the decisions, may the City Council subdivide a specific plan area, such that Mayor Lumbard and Councilmember Gallagher could take part in certain decisions from which they are not disqualified?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

1. No, lacking clear and convincing evidence that such decisions would have no measurable financial impact on their respective real property interests, the Act prohibits the officials from taking part in such decisions, including providing feedback with respect to a preliminary “vision plan” for development of the specific plan area.
2. Regulation 18706 provides the procedure by which the City Council—without Mayor Lumbar's or Councilmember Gallagher’s participation—could properly segment decisions such that Mayor Lumbar and Councilmember Gallagher could permissibly take part in certain decisions that would not have a reasonably foreseeable, material financial effect on their economic interests.

FACTS AS PRESENTED BY REQUESTER

Austin Lumbar is the Mayor of the City of Tustin (“City”) and a member of the City Council. Ryan Gallagher is also a member of the City Council. Both officials own and reside in homes in the Greenwood community within 500 feet of an approximately 180-acre area of City-owned, undeveloped land making up a portion of Planning Area 15-A (“PA 15-A”) within the Tustin Legacy Specific Plan.

PA 15-A is one of three subplanning areas in the approximately 271-acre Planning Area 15, which itself is part of the 1,500-acre Tustin Legacy Specific Plan (“Specific Plan”). The entirety of the Specific Plan was formerly a portion of Marine Corps Air Station Tustin (“MCAS Tustin”), and the City of Tustin is the federally-designated Local Reuse Authority for MCAS Tustin. The reuse process for the former MCAS Tustin involves City decision-making regarding land use regulation such as the prior adoption, previous amendments and consideration of any proposed future amendments to the Specific Plan as well as decisions regarding the sale of real property for private development, public amenities/infrastructure and public uses, ground leases and interim leases, and other dispositions of real property. The Specific Plan contains general land use regulations and policies governing the development of Planning Area 15, inclusive of PA 15-A.

The Specific Plan was adopted in 2003 and most recently amended in 2017, prior to Mayor Lumbar and Councilmember Gallagher’s election to the City Council in 2018 and 2020, respectively.

Per the Specific Plan, Planning Area 15 is envisioned to provide mixed-use, transit-oriented development, including residential, retail commercial, parks and open space, and office uses. All of PA 15-A has been conveyed to the City by the Federal government as part of the reuse process and is currently owned in fee by the City. The City’s reuse plans for PA 15-A anticipate that most or all of it will be sold, pursuant to a competitive process, and in compliance with the Surplus Land Act, for future development by private developers consistent with the Specific Plan.

As part of the City’s implementation of the Specific Plan, City staff’s work on a draft vision plan for PA 15-A is nearing completion. The purpose of the vision plan is to conceptually illustrate what buildout of PA 15-A could look like in terms of design character, placement of uses, intensity and mix of uses, open space, and circulation. The vision plan does not itself have any authority to

change the permitted uses of properties nor would it alter development standards such as lot dimensions, setbacks, or building height regulations.

The vision plan is guided by prior public input and prior City Council policy direction, which also occurred prior to the respective elections of Mayor Lombard and Councilmember Gallagher. Any changes to the vision plan would be made administratively at the City staff level and would not require City Council approval. Any changes to the existing Specific Plan, however, will require City Council approval in noticed public meetings.

The City Council will not be asked to approve the vision plan, but Councilmembers will have the opportunity to ask questions and to provide feedback to City staff about the vision plan and about future development options in PA 15-A. Such feedback might influence City staff's decisions about the content of the vision plan, which, in turn, could influence whether and what kind of proposed amendments to the Specific Plan are presented to the City Council for consideration in public meetings, as well as future Council decisions regarding the sale of real property for private development, public amenities/infrastructure and public uses, ground leases and interim leases, and other dispositions of real property.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use [their] official position to influence a governmental decision in which [the official] knows or has reason to know he has a financial interest.”

Under Regulation 18700(c)(4), “governmental decision” means “any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision.” You have asked whether decisions regarding the vision plan, which pertains only to PA 15-A, would meet that standard “[s]ince the undeveloped areas of PA 15-A are owned in fee by the City of Tustin” Although the land is entirely owned by the City, changes to a parcel of land can have a financial effect on surrounding properties. Accordingly, decisions regarding the vision plan—which will help shape changes to PA 15-A and the Specific Plan and thereby potentially financially affect surrounding properties—qualify as “governmental decisions” for purposes of the Act.

“A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Included among those specified economic interests is “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).)

Mayor Lombard and Councilmember Gallagher have economic interests in their respective real properties.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial

interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)."

Where, as here, an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property. (Regulation 18702.2(a)(7).)

Here, Mayor Lombard and Councilmember Gallagher have real property located less than 500 feet from the PA 15-A boundary. PA 15-A is currently undeveloped and is envisioned to provide mixed-use, transit-oriented development, including residential, retail commercial, parks and open space, and office uses. The vision plan is intended to conceptually illustrate what buildout of PA 15-A could look like in terms of design character, placement of uses, intensity and mix of uses, open space, and circulation. While the vision plan would not change permitted uses of properties or alter development standards, it could influence future Specific Plan amendment proposals presented to the City Council, as well as future City Council decisions regarding the sale of real property for private development, public amenities/infrastructure and public uses, ground leases and interim leases, and other dispositions of real property.

Given the lack of any evidence indicating governmental decisions relating to the development of PA 15-A or Specific Plan amendments affecting PA 15-A would have no measurable impact on Mayor Lombard's or Councilmember Gallagher's respective real properties, Regulation 18702.2(a)(7) prohibits the two officials from taking part in such decisions. This includes providing feedback to City staff regarding the content of the vision plan, given that such feedback would potentially impact the substance of PA 15-A decisions subsequently presented to the City Council and an "official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Regulation 18704(b).) The Act does not prohibit either official from receiving information from staff to the extent that they refrain from making, participating in making, or attempt to influence any governmental decision concerning PA 15-A.

You have also asked if the City Council, including Mayor Lombard and Councilmember Gallagher, could decide on whether or how to subdivide PA 15-A, such that Mayor Lombard and

Councilmember Gallagher could take part in certain decisions involving parcels located 1,000 feet or more from their respective real properties.²

Under Regulation 18706, an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

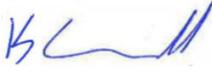
Because decisions on whether or how to subdivide PA 15-A would involve real property located from the officials' real property interests, Regulation 18702.2(a)(6) prohibits them from taking part in such decisions for the reasons discussed above. However, if the above conditions are met, Mayor Lumbar and Councilmember Gallagher may take part in the remaining decisions from which they are not disqualified under the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By:


Kevin Cornwall
Counsel, Legal Division

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² We note that you have also inquired, “[i]f PA 15-A is subdivided such that some of the newly-established parcels within PA 15-A are then more than 1,000 feet away from the property owned by Mayor Lumbar and Council[member] Gallagher, may they participate in decision-making regarding those new parcels that are then more than 1,000 feet from their property?” We cannot advise on whether Mayor Lumbar and Councilmember can take part in all such decisions because conflicts of interest under the Act are analyzed and determined on a decision-by-decision basis. However, as a general matter, the financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is not considered material unless there is clear and convincing evidence the governmental decision would have a substantial effect on the official's property. (Regulation 18702.2(b).)